Pelita Leisures Sdn Bhd v Tsai Chee Jung

HIGH COURT (KUCHING) — SUIT NO 22–98 OF 2003-11
HAMID SULTAN JC
10 MAY 2007

Contract — Sale and Purchase — Consideration — Whether there was an agreement — Whether RM120,000 was consideration for sale and purchase of property

Civil Procedure — Interest — Judgment interest — Whether it was mandatory for the court to award judgment interest from the date of judgment until the date of realisation — Rules of the High Court 1980 O 42 r 12; Subordinate Courts Rules 1980 O 29 r 12; Civil Law Act 1956 s 11

The plaintiff gave a sum of RM120,000 to the defendants, both of whom were co-owners of a piece of property ('the house') which the plaintiff occupied for purchase of the house. There was no written agreement and the transfer documents were also not executed as it was based on mutual trust. Subsequently, the defendants wrote to the plaintiff requesting the plaintiff to hand over vacant possession. The plaintiff claimed that the defendants were in breach of their verbal agreement and claimed against the defendant for specific performance of the house or damages in lieu thereof or in the alternative a refund of the RM120,000 with interest, including judgment interest. The defendants claimed that the sum of money was not towards purchase of the house but rather was consideration of the first defendant accepting a job as a director in the plaintiff's company and that vacant possession had been given gratuitously and subject to the condition that the plaintiff could occupy the house until the first defendant ceased employment with the plaintiff or until the defendant disposed of the house. The issues in contention were, inter alia, whether there was an agreement that the house be sold and what the purpose was for the sum of money paid.

Held, ordering the defendants to pay the plaintiff RM120,000 with no interest and costs:

(1) Negotiations for the purchase of the house (if any) were personal in nature between PW1, the servant/agent of the plaintiff, and were not between the plaintiff and the defendants. There was no evidence adduced by the plaintiff supported by contemporaneous documents to show that there was any form of agreement between the plaintiff and the defendants. The letter from the plaintiff's solicitor dated 23 July 2003 clearly negated any form of unconditional sale (see para 12). The plaintiff had not made out a case for the refund of money as there was no evidence to establish a sale and purchase agreement (see para 14).

(2) The defendants' evidence that the said sum was not paid for the purchase of the said house but as a consideration was not supported by any contemporaneous documents. That line of defence failed (see para 15).

(3) The plaintiff had no case for specific performance and had abused the process of court. It had wasted much judicial time when any related claim other than specific performance could have been filed in the subordinate court (see para 16).

(4) Under the Civil Law Act 1956, the court has discretion only to award interest from the date the cause of action arose until the date of judgment. It is not clear whether it is mandatory for the court to award judgment interest from the date of judgment until the date of realisation. This doubt was created as a result of the wording of O 42 r 12 of the Rules of the High Court 1980 ('the RHC') and O 29 r 12 of the Subordinate Courts Rules 1980 which states 'Every judgment debt shall carry interest...' whereas under the Additional Powers of the High Court provisions and the subordinate court provisions it is only stated the court has the 'power' to direct interest. Thus, under the additional power, interest is not mandatory (see para 17(c)). The court was of the view that judgment interest was always discretionary (see para 17(d)).

(5) Section 11 of the Civil Law Act 1956 states that the court can only grant interest before the judgment if the matter has been 'tried'. A default judgment may not be entitled to interest before judgment. In that case the court may still award interest after judgment until the date of realisation. The discretion to award interest must only be exercised where money has been wrongfully withheld from the plaintiff and should not be exercised as of right in analogy with normal rules as to costs (see para 17(e)). The plaintiff was not entitled to pre-judgment interest under s 11 as the plaintiff's solicitors' letter dated 23 July 2003 negated such a right. Further, the plaintiff was in occupation of the said property without any payment of rental and in consequence it would be unjust to compensate the plaintiff with interest when the plaintiff had the full benefit of the use of the said house (see para 18).

(6) In respect of post-judgment interest, although O 42 r 11 of the RHC is worded in a mandatory form to grant interest, the rules of procedure could not create substantive rights and more so it could not be done in violation of the parent Act and any form of interpretation to give mandatory effect to rules of procedure would be against procedural jurisprudence unless the justice of the case requires so (see para 19).

[Bahasa Malaysia summary

Plaintif telah memberi sejumlah wang sebanyak RM120,000 kepada defendan-defendan, yang mana kedua-duanya adalah pemilik bersama harta ('sebuah rumah'). Tidak terdapat sebarang perjanjian bertulis dan dokumen pindahmilik yang telah dilaksanakan kerana ia adalah amanah bersama. Kemudiannya, defendan telah menulis kepada plaintif meminta plaintif untuk menyerahkan milikan kosong. Plaintif mendakwa bahawa defendan telah memungkiri perjanjian lisan dan menuntut terhadap defendan untuk pelaksanaan spesifik terhadap rumah dan sebagai gantiruginya ataupun secara alternatifnya memulangkan RM120,000.00 dengan

faedah, termasuklah faedah penghakiman. Defendan pula mendakwa bahawa sejumlah wang tersebut bukanlah berkaitan dengan pembelian rumah tetapi lebih kepada balasan terhadap defendan pertama kerana telah menerima pekerjaan sebagai pengarah dalam syarikat plaintif dan milikan kosong tersebut telah diberikan secara percuma dan tertakluk kepada syarat-syarat bahawa plaintif boleh mendiami rumah tersebut sehingga defendan pertama berhenti bekerja dengan plaintif atau sehingga plaintif menjual rumah tersebut. Isu-isu pertikaian adalah, antara lain, sama ada terdapat perjanjian untuk menjual rumah tersebut dan apakah tujuan wang tersebut.

Diputuskan, memerintahkan defendan-defendan membayar kepada plaintif RM120,000.00 dengan tiada faedah dan kos:

(1) Perbincangan-perbincangan untuk membeli rumah tersebut (jika ada) adalah secara semulajadinya bersifat peribadi dan tidak antara plaintif dan defendan-defendan. Tiada bukti dikemukakan oleh plaintif yang disokong oleh dokumen-dokumen semasa untuk menunjukkan terdapat sebarang bentuk perjanjian antara plaintif dan defendan-defendan. Surat peguamcara plaintif bertarikh 23 Julai 2003 secara jelasnya menidakkan sebarang bentuk penjualan bersyarat. (lihat perenggan 15). Plaintif tidak ada kes untuk kembalian wang kerana tidak ada bukti menunjukkan adanya perjanjian jual beli. (lihat perenggan 17).

(2) Keterangan defendan-defendan bahawa jumlah tersebut tidak dibayar bagi pembelian rumah tersebut tetapi sebagai balasan tidak pula disokong dengan dokumen-dokumen semasa. Barisan pembelaan telah gagal (lihat perengggan 17).

(3) Plaintif tidak ada kes untuk pelaksanaan spesifik dan telah menyalahgunakan proses mahkamah. Ia telah banyak membuang masa kehakiman bila tuntutan seperti ini selain pelaksanaan spesifik boleh difailkan di mahkamah rendah. (lihat perenggan 17-18).

(4) Di bawah Akta Undang-undang Sivil 1956, mahkamah hanya mempunyai budi bicara untuk mengawardkan faedah dari tarikh timbulnya kausa tindakan sehingga tarikh penghakiman. Ia tidak jelas sama ada ia adalah mandatori bagi mahkamah mengawardkan faedah penghakiman dari tarikh penghakiman sehingga penyelesaian sepenuhnya. Keraguan ini tercipta oleh kerana perkataan dalam A 42 k 12 Kaedah-kaedah Mahkamah Tinggi 1980 dan A 29 k 12 Kaedah-kaedah Mahkamah Rendah 1980 yang menyatakan 'setiap hutang penghakiman akan membawa faedah…' manakala di bawah Kuasa-kuasa Tambahan Mahkamah Tinggi dan Rendah menyatakan bahawa mahkamah mempunyai 'kuasa' untuk mengarahkan faedah. Dengan itu di bawah kuasa tambahan, faedah bukanlah sesuatu yang mandatori. Mahkamah berpendapat bahawa penghakiman berserta faedah adalah pada kebiasannya adalah mengikut budi bicara. (lihat perenggan 23).

(5) Seksyen 11 Akta Undang-undang Sivil 1956 menyatakan bahawa mahkamah akan hanya memberikan faedah sebelum penghakiman jika perkara tersebut telah 'dibicarakan'. Penghakiman Ingkar tidak akan diberikan faedah sebelum penghakiman. Dalam pada itu mahkamah masih mengawardkan faedah

selepas penghakiman sehingga tarikh penyelesaian sepenuhnya. Budi bicara untuk mengawardkan faedah mestilah dibuat bila wang secara salahnya ditahan dari plaintif dan tidak boleh diberikan sebagai hak dalam persamaan dengan kaedah-kaedah biasa terhadap kos (lihat perenggan 24). Plaintif tidak berhak mendapat faedah sebelum penghakiman di bawah seksyen 11 kerana surat peguam plaintif bertarikh 23-7-2003 telah menidakkan hak tersebut. Selanjutnya, plaintif pada ketika itu telah mendiami harta tersebut tanpa sebarang bayaran sewa dan dengan sebab itu tidak adil untuk mempampas plaintif dengan faedah bila plaintif telah memanfaatkan sepenuhnya penggunaan rumah tersebut (lihat perenggan 25).

(6) Berkenaan faedah selepas penghakiman, walaupun A 42 k 11 KMT digubah dalam bentuk mandatori untuk membenarkan faedah, kaedah-kaedah prosedur tidak boleh membuat hak-hak substantif dan lebih-lebih lagi tidak boleh dibuat melalui pencabulan kepada Akta induk dan setiap bentuk penterjemahan untuk memberikan kesan madatori kepada kaedah-kaedah prosedur adalah bertentangan dengan prosedur jurisprudens melainkan keadilan dalam kes berkehendakkannya. (lihat perenggan 25).]

Notes

For cases on consideration, see

Cases referred to

Business Computers Ltd v Anglo African Leasing Ltd [1977] 2 All ER 74 (refd)
Davis, Re [1947] 75 CLR 409 (refd)
Foo Sey Koh & Ors v Chua Seng Seng & Ors [1986] 1 MLJ 501 (refd)
London, Chatham and Dover Railway v South Eastern Railway (1883) AC 429 (refd)
Malayan United Bank Bhd v Mohamed Salleh bin Mohammed Yusoff & Ors [1988] 3 MLJ 165 (refd)
New Zealand Insurance Co Ltd v Ong Choon Lin (t/a) Syarikat Federal Motor Trading [1992] 1 MLJ 185 (refd)
Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors [1994] 1 MLJ 495 (refd)
Public Prosecutor v Goh Thor Kiah [1952] MLJ 91 (refd)
State of UP v Babu Ram AIR 1961 SC 751 (refd)

Legislation referred to

Civil Law Act 1956 s 11
Courts of Judicature Act 1964 s 16(i)
Rules of the High Court 1980 O 42 r 11, r 12
Subordinate Court Act 1948 Sch
Subordinate Courts Rules 1980 O 29 r 12

John Shek (John Shek, Sigar, Wei Yee & Co) for the plaintiff.
Sunny Si (Si & Associates) for the defendant.

Hamid Sultan JC:

[1] This is my judgment in respect of the plaintiff's claim against the defendants for specific performance of a house or damages in lieu thereof or in the alternative to

refund of RM120,000 together with interest at the current banking rate from the date of the first payment until judgment and thereafter at the rate of 8.0% per annum until full settlement.

[2] The plaintiff in the statement of claim, inter alia, says that:

(i) A sum of RM120,000 was given to the defendants both of whom are co-owners of a property known as Lot 3299 Block 1 Lambir Land District ('the house') as the purchase price for the said house in which the plaintiff is presently in occupation.

(ii) As the first defendant was a cousin of the servant/agent of the plaintiff, there was no written agreement and the transfer documents had not been executed. The whole transaction was done based on mutual trust.

(iii) The defendants, sometime on 19 July 2003 issued a letter through their solicitors requesting the plaintiff to hand over vacant possession.

(iv) The plaintiff replied through its solicitor's letter dated 23 July 2003, wherein it was stated that since the defendants had instructed their solicitors to demand the plaintiff to move out from the said house, the defendants were in breach of the verbal agreement reached. Hence, the plaintiff had no alternative but to ask for refund of RM120,000, together with interest at the current banking rate on the date of payments or specific performance of the transfer of the said house to that effect.

[3] The defendants in their defence, inter alia, say as follows:

(i) The defendants admit receipt of RM120,000 from the plaintiff but say that it was not towards purchase of the said house but as consideration of the first defendant for accepting a job as a director in the plaintiff's company.

(ii) Vacant possession was given to the plaintiff gratuitously and subject to the condition that the plaintiff may occupy the said place until the first defendant ceases to be in the employment of the plaintiff or until the defendants dispose of the house.

(iii) The plaintiff is not entitled to specific performance for the transfer of the said house or damages in lieu thereof.

[4] In support of the parties' case, a number of documents were relied on and they are, inter alia, as follows:

(i) Bundle of pleadings (encl 26).

(ii) Statement of agreed facts (encl 33).

(iii) Disputed facts (encl 34).

(iv) Bundle of documents (authenticity only) (encl 28).

(v) Bundle of documents (authenticity and contents) (encl 27).

(vi) Issues to be tried (encl 35).

(vii) Plaintiff's bundle of documents (encl 21).

(viii) Defendants' bundle of documents (encl 29). A

[5] The statement of agreed facts reads as follows:

(i) The defendants are both husband and wife living at the above mentioned address B

(ii) The defendants are registered co-proprietors of one unit of single storey semi detached house situated at Miri and known as Lot 3299 Block 1 Lambir Land District.

(iii) The plaintiff had paid a sum of RM120,000 by three separate cheques into the account no. 4334024716 (Public Bank Berhad, Miri Branch) of the first defendant and second defendant personally. C

(iv) The first defendant is a cousin of Chai Min Foh, a servant or agent of the plaintiff.

(v) There was a police report lodged on 4 May 2003 at Padungan Police Station, Kuching vide Police Report No. PAD/1530/2003 and investigation is still in progress. D

[6] The statement of disputed facts reads as follows: E

(i) The first defendant was a sales executive with TLS Marketing Sdn Bhd of Lot 1036, Piasau Industrial Estate, 98000 Miri, earning approximately RM3,500 per month.

(ii) The second defendant was a housekeeping supervisor with Dynasty Hotel (Dynasty Landmark Sdn Bhd) of Lot 638, Block 9, Jalan Pujut-Lutong, Miri, earning more than RM2,000 per month. F

(iii) Sometime towards the end of the year 2000, the plaintiff through its servant or agent, one Chai Min Foh, orally offered the sum of RM120,000 to the first defendant in consideration of the first defendant accepting a job with directorship in the plaintiff's company, the said job entailed the first defendant to be based in Kuching. G

(iv) The said house was left vacant and the first defendant allowed the plaintiff, its servant or agent, to use the said house gratuitously and until the first defendant ceased to be in the employment of the plaintiff or upon the defendants' disposal of the said house. H

[7] In summary, the issues to be tried read as follows:

(i) Were there negotiations to sell one single storey semi detached house situated at Miri and known as Lot 3299 Block 1 Lambir Land District ('the said house') to the plaintiff? If there was: I

(a) did the defendants approach the plaintiff with an intention to sell the said house?

(b) was an agreement reached?

(ii) What was the purpose of the plaintiff paying the sum of RM120,000 to the defendants?

(a) was the payment of RM120,000 consideration for the first and second defendants to quit their respective jobs in Miri and to move to Kuching where the first defendant was offered work with the plaintiff?

(b) was the payment of RM120,000 consideration for the said house?

(iii) if issue (ii)(a) above is true:

(a) was there a collateral contract between the plaintiff and the defendants to allow the plaintiff, its servants or agents to use the said house gratuitously?

(b) when did the defendants cease to be in the employment of the plaintiff?

(iv) if issue (ii)(b) is true:

(a) was there a valid agreement to sell the said house?

(b) if so, was the consideration adequate?

(c) is the plaintiff entitled to a refund in the sum of RM120,000?

(d) is the plaintiff entitled to specific performance of the said house or damages in lieu thereof?

[8] On behalf of the plaintiff, two persons gave evidence. They were the chairman of the plaintiff, Mr Choi Min Foh (PW1) who was instrumental to the transaction and the plaintiff has pleaded that he was a cousin to the first defendant. The other was Mr Chong Fu Viu, a full time company secretary who was involved in the affairs of the plaintiff in respect of the sale of the said house. The defendants were present and gave evidence.

[9] I have gone through the witness evidence in detail and perused the facts of this case. I take the view that it is not necessary to deliberate in great detail as the issues are quite straight forward, and the court is not bound to deal with each and every issue the parties have agreed to be tried.

[10] The plaintiff, inter alia, submits as follows:

(a) The plaintiff's claim is against the defendants for the specific performance of said house or in lieu damages for the sum of RM120,000 with interest.

(b) By an oral agreement made between the plaintiff through its chairman Mr Chai Min Foh (PW1) and the defendants on 17 January 2001, the defendants agreed to sell and the plaintiff agreed to buy the said house. As a result, a Public Bank Berhad cheque for the sum of RM40,000 was paid by the plaintiff into the joint account of the defendants as a deposit. There was no written agreement between them as Mr Chai Min Foh from the plaintiff and the defendants were closely related cousins and the agreement was based on mutual trust. The plaintiff or its workers immediately moved into the said house together with the company's equipment after the first payment. Two further cheques bearing the same sum of RM40,000 each were deposited

into the joint account of the defendants vide two Public Bank Berhad cheques dated 16 March 2001 and 1 April 2001 respectively. A

(c) Later, the first defendant was employed by the plaintiff and started working for the plaintiff with effect from 1 February 2001. The first defendant was later offered the directorship on 3 March 2001. In such offer, there was no mention of the sum of RM120,000 as being due to be paid to the first defendant when he was appointed as a director. The letter only mentioned the first defendant's salary and commissions he would receive while working for the plaintiff. The first defendant had duly acknowledged the letter by signing it. The date of appointment had been confirmed by PW2 Chong Fu Vui, the secretary of the plaintiff's company and the first defendant admitted it. B C

(d) The plaintiff from time to time had asked the first defendant when the first defendant would transfer the said house to the plaintiff. The first defendant told the plaintiff that the discharge of the house from the bank had not been fully completed yet. Owing to the facts that the first defendant was/and still is the close cousin of PW1 and the first defendant was then a staff member of the plaintiff, the plaintiff believed the first defendant. D

(e) Some time in early April 2003, the plaintiff discovered that the first defendant had misappropriated a large sum of money amounting to RM180,189.38 from the plaintiff's company. A police report was lodged on 4 May 2003. The plaintiff immediately approached the first defendant and enquired as to what happened to the said sum. The first defendant immediately resigned. At the same time the plaintiff removed the first defendant as director of the plaintiff's company and terminated the post held by the first defendant immediately. E F

(f) In evidence, the defendants alleged that the RM120,000 was paid to the first defendant when he was offered the post of director from the plaintiff. The defendants denied that the said RM120,000 was for the purchase of the said house. The defendants produced salary receipts as proof that they had been earning handsome salaries before the first defendant was appointed as director. The first defendant admitted that he made all claims in Miri and not in Kuching. Nevertheless the maker of such report was not called to come to offer any evidence to support such report. Likewise, the second defendant did produce her report on her salary and commission and she also did not call the maker of such documents to come to offer any evidence. No reason had been given as to why the witnesses were not called to give evidence. It is trite law that if any document is tendered and the maker is not called and no explanation is given for his non attendance in court, it serves no purpose and should not be admitted. G H

(g) It is for the court to determine if there was an oral agreement for the sale and purchase of the said house or if the sum RM120,000 was paid to the first defendant when he was appointed as the director of the plaintiff's company. Ipso facto based on the appointment letter, the first defendant was appointed as director of the plaintiff's company on 3 March 2001. The first defendant started working for the plaintiff on 1 February 2001 and not on 1 January 2001 as stated in his defence. The payment of the deposit was made on I

17 January 2001 before the first defendant started to work for the plaintiff. This shows that the first defendant was not telling the truth. As for the second defendant, she was in complete denial as to receiving any cheque from the plaintiff. However, the cheques were banked into the joint account of the first and second defendants in January 2001.

(h) The plaintiff had proven his case beyond all possibilities. In the circumstances, judgment must be entered against the first and second defendants with cost to be taxed unless agreed.

[11] The defendants, inter alia, submit as follows:

(a) The plaintiff has failed to prove its case on a balance of probabilities.

(b) The plaintiff has failed to produce any evidence to show that the parties had entered into an agreement pertaining to the sale of the said house.

(c) It is obviously clear that PW1 paid RM120,000 to the defendants to 'compensate' them for giving up their existing stable jobs and to relocate to a new living and working environment in Kuching.

[12] From the evidence of PW1, it is clear to my mind that the negotiations for the purchase of house if (any) were personal in nature, ie, between PW1 and the first defendant and were not between the plaintiff and the defendants. There was no evidence adduced by the plaintiff supported by contemporaneous documents to show that there was any form of agreement between the plaintiff and the defendants. Further, the letter from the plaintiff's solicitor dated 23 July 2003 clearly negates any form of unconditional sale. The contents of the letter are now reproduced.

Your Ref: LSP/MISC/2003/LSP Our Ref: JS/P/7/03/CC

Date: 23 July 2003

M/S Kadir, Wong, Lin & Co. Nos. 98 & 100, 1st and 2nd Floors Jalan Bendahara P.O. Box 949 98008 Miri By A/R Registered

Dear Sirs

Re: Property – Lot 3299 Block 1 Lambir Land District

We act for and on behalf of Pelita Leisure Sdn. Bhd. and have been instructed to acknowledge receipt of your letter dated 16 July 2003.

We regret to inform you that our client will not remove all the machines and goods in the said house for he has purchased that house from your client for RM120,000.00 starting from 1/2/2001. All the payments made in three cheques have been paid to your client through his Public Bank Berhad Account No. 4334024726.

Our client did not enforce the transfer because your client is our client's cousin and your client has promised our client that our client can use the said house until your client has enough money to repay our client the sum of RM120,000 together with interest at the current banking rate.

A

> And at the same time our client gave him a job at Pelita until the company discovered that he has misappropriated a big sum of money. A police report has been lodged and he is being investigated. Since your client has misappropriated and is owing our client a lot money and your client has become unreasonable, our client has no choice but to lodge a caveat against the said house and apply for the said house to be transferred to our client.
>
> Hoping that such action is not necessary and that you could ask your client to pay back our client the sum of RM120,000 together with interest at the current banking rate thereon. And upon receipt of said sum and interest our client will automatically move out from the said house.
>
> Yours faithfully
>
> Sgd. _____ JOHN SHEK, SIGAR, WEI YEE & CO.

B

C

[13] Reading para 3 of the said letter it is clear that the plaintiff is not entitled to specific performance.

D

[14] Further, from the evidence of PW1 and from the documentary evidence it is clear that the plaintiff has not made out a case for the refund of money as there was no evidence to establish a sale and purchase agreement. However, as the defendants in the agreed facts had conceded that they have received the sum of RM120,000 from the plaintiff, it is necessary for me to consider whether plaintiff is entitled to judgment purely on the admission.

E

[15] The evidence of the defendants alleging that the said sum was not paid for the purchase of the said house but as a consideration of the first defendant for accepting a job as a director in the plaintiff's company, is not supported by any contemporaneous documents and in consequence that line of defence fails and the admission stands.

F

[16] After having heard the case in full and after having considered the evidence in detail, I take the view that the plaintiff, having no case for specific performance, has abused the process of court and filed an action in the High Court for a subject property which is only RM120,000 and thereby has wasted much of the judicial time when any related claim other than specific performance could have been filed in the subordinate court. To stop such practice it is necessary for courts to consider punitive measures such as ordering the solicitors to bear the costs personally or depriving the successful litigant costs etc.

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H

[17] In this case, the plaintiff is seeking interest inclusive of judgment interest. I consider that it will be an opportune moment to set out the law on pre- and post-judgment interest as a guiding principle to be followed by the subordinate courts. This may be summarised as follows:

I

(a) At common law, interest was not payable on ordinary debts unless expressly or impliedly provided under the terms of the contract or mercantile usage or

statute (see London, Chatham and Dover Railway v South Eastern Railway (1883) AC 429).

(b) There are a number of provisions which provide for the court to award interest on a judgment sum. Judgment interest can be divided into two types, namely interest before judgment (pre) and interest after judgment (post). The relevant provisions which deals with judgment interest are as follows:

(i) The Civil Law Act 1956 ('the CLA') s 11 which states:

> In any proceedings tried in any court for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment, provided that nothing in this section:
>
> (a) shall authorise the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

(ii) Section 16(i) of the Courts of Judicature Act 1964('the CJA') which states:

> Rules of court may be made for the following purposes for regulating the rate of interest payable on all debts, including judgment debts or on the sums found due on taking account between parties, or on sums found due and unpaid by receivers or other persons liable to account to the court: Provided that in no case shall any rate of interest exceed eight per centum per annum, unless it has been otherwise agreed between parties.

(iii) Additional Powers of High Court in para 7 of Schedule of the CJA which states:

> Power to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the court.

(iv) RHC O 42 r 12 which states:

> Every judgment debt shall carry interest at the rate of eight per centum per annum or at such other rate not exceeding the rate aforesaid as the court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

(v) Schedule to Subordinate Courts Act 1948 ('the SCA') which states:

> Power to direct interest to be paid on debts, including judgment debts or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the court.

(vi) Subordinate Courts Rules 1980 ('the SCR') O 29 r 12 which states:

> Every judgment debt shall carry interest at the rate of eight per centum per annum, or at such other rate not exceeding the rate aforesaid as the court shall direct (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

(c) It is clear under the Civil Law Act that the court has discretion only to award interest from the date the cause of action arose and until the date of judgment. However it is not clear whether it is mandatory for the court to award judgment interest from the date of judgment until the date of realisation. This doubt is created as a result of the wording of O 42 r 12 of the RHC and O 29 r 12 of the SCR which states 'Every judgment debt shall carry interest...' whereas under the Additional Powers of the High Court and Subordinate Court it is only stated that the court has the 'power' to direct interest. Thus, under the additional power, interest is not mandatory. The question here is whether the RHC and the SCR can provide for mandatory interest when under the CJA and the SCA interest is only discretionary. The word 'shall' even in statutes, as opposed to rules of court, may not be construed to be mandatory or imperative but has been interpreted to be discretionary only. Support for this proposition can be found in many cases, such as the following:

(i) In *Re Davis* [1947] 75 CLR 409 at p 419, Starke J opined:

> The word 'shall' does not always impose an absolute and imperative duty to do or omit the act prescribed. The word is facultative: it confers a faculty or power. … The word 'shall' cannot be construed without reference to its context.

(ii) In *State of UP v Babu Ram AIR* [1961] SC 751 at p 765, Subba Rao J opined:

> The relevant rules of interpretation may be briefly stated thus: when a statute uses the word 'shall', prima facie it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.

(iii) In *Public Prosecutor v Goh Thor Kiah* [1952] MLJ 91 at p 92, Taylor J opined:

A I do not think that the word 'shall', in a procedural statute, could be construed as strictly as is here contended if the consequence is violation of a fundamental principle; I think that on the true principles of construction of statutes the word 'shall' must be given a meaning modified to the extent which I have indicated.

B (d) Notwithstanding the wording of the provisions of the RHC and the SCR it is my considered view that judgment interest is always discretionary and not mandatory. In awarding interest the court must exercise its discretion judicially and must not award interest to the plaintiff as a matter of right as what is presently being done in cases of default judgment. The court should turn its mind to the principle involved in respect of the issue of interest before awarding the same (see *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a) Syarikat Federal Motor Trading* [1992] 1 MLJ 185; *Foo Sey Koh & Ors v Chua Seng Seng & Ors* [1986] 1 MLJ 501).

D (e) It must be asserted that on the true construction of s 11 of the Civil Law Act 1956, the court can only grant interest before the judgment if the matter has been 'tried'. Thus, literally, a default judgment may not be entitled to interest before judgment. In the case of a default judgment, the court may still award interest after judgment until date of realisation. However, the discretion to award interest must only be exercised where E money has been wrongfully withheld from the plaintiff and should not be exercised as of right in analogy with normal rules as to costs (see *Business Computers Ltd v Anglo African Leasing Ltd* [1977] 2 All ER 74; *Malayan United Bank Bhd v Mohamed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165; *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495).

F (f) There are number of exceptions to the above, for example different principles apply in respect of interest relating to personal injury claim.

[18] On the facts of this case, I take the view that the plaintiff is not entitled to G pre-judgment interest under s 11 of the Civil Law Act 1956 as the plaintiff's solicitors' letter dated 23 July 2003 para 3 negates such right. Further, as the plaintiff was in occupation of the said property without any payment of rental, in consequence it would be unjust to compensate the plaintiff with interest when the plaintiff had the full benefit of the use of the said house.

H **[19]** In respect of post-judgment interest, for the reasons stated above, I take the view that though O 42 r 11of the RHC is worded in a mandatory form to grant interest, the rules of procedure cannot create substantive rights and more so it cannot be done in violation of the parent Act and any form of interpretation to give mandatory effect to rules of procedure will be against procedural jurisprudence unless I justice of the case requires it so.

[20] For reasons stated above, it is my judgment that the defendants pay the plaintiff the sum of RM120,000 with no interest and costs. I hereby so order.

Defendants to pay plaintiff RM120,000 without interest and costs.

Reported by Kenny Wong